Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 85-142)

Statutory Amendment

Text of Public Laws 98-364, 98-454, and 99-36, Documentation of Vessels

Chapter 121 of Title 46, United States Code, sections 12101-12122, entitled "Documentation of Vessels", was set forth in Treasury Decision 84-40, dated February 7, 1984. Some of those sections were amended by Public Law 98-364, dated July 17, 1984, Public Law 98-454, dated October 5, 1984 and Public Law 99-36, dated May 15, 1985. The text of the sections, as amended, are reproduced below.

Dated August 22, 1985.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

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§ 12101 Related terms in other laws.

When used in a law, regulation, document, ruling, or other official act referring to the documentation of a vessel—

(1) "certificate of registry", "register", and "registry" mean a registry as provided in section 12105 of this title.

(2) "license", "enrollment and license", "license for the coastwise (or coasting) trade" and "enrollment and license for the coastwise (or coasting) trade" mean a coastwise license as provided in section 12106 of this title.

(3) "enrollment and license to engage in the foreign and coastwise (or coasting) trade on the northern, northeastern, frontiers, otherwise than by sea" means a Great Lakes license as provided in section 12107 of this title.

(4) "license for the fisheries" and "enrollment and license for the fisheries" mean a fishery license as provided in section 12108 of this title.

(5) "yacht" means a recreational vessel even if not documented.

(6) "fisheries" includes planting, cultivating, catching, taking, or harvesting fish, shellfish, marine animals, pearls, shells, or marine vegetation in the navigable waters of the United States or in the fishery conservation zone established by section 101 of the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. 1811).

§ 12104 Effect of documentation.

A certificate of documentation is—

(1) conclusive evidence of nationality for international purposes, but not in a proceeding conducted under the laws of the United States;

(2) except for a recreational vessel license, conclusive evidence of qualification to be employed in a specified trade; and

(3) not conclusive evidence of ownership in a proceeding in which ownership is in issue.

§ 12106 Coastwise licenses and registry.

(a) A coastwise license or, as provided in section 12105(c) of this title, an appropriately endorsed registry, may be issued for a vessel that—

(1) is eligible for documentation;

(2)(A) was built in the United States; or

(B) if not built in the United States, was captured in war by citizens of the United States and lawfully condemned as prize, was adjudged to be forfeited for a breach of the laws of the United States, or qualified for documentation under section 4136 of the Revised Statutes (46 App. U.S.C. 14); and

(3) otherwise qualifies under laws of the United States to be employed in the coastwise trade.

(b) Subject to the laws of the United States regulating the coastwise trade and the fisheries, only a vessel for which a coastwise license or an appropriately endorsed registry is issued may be employed in—

(1) the coastwise trade; and

(2) the fisheries.

(c) A coastwise license to engage in the coastwise trade of fisheries products between places in Guam, American Samoa, and the Northern Mariana Islands may be issued for a vessel that—

(1) is less than two hundred gross tons;

(2) was not built in the United States;

(3) is eligible for documentation; and

(4) otherwise qualifies under the laws of the United States to be employed in the coastwise trade.

§ 12108 Fishery licenses and registry.

(a) A fishery license or, as provided in section 12105(c) of this title, an appropriately endorsed registry, may be issued for a vessel that—

(1) is eligible for documentation; and

(2)(A) was build in the United States; or

(B) if not build in the United States, was captured in war by citizens of the United States and lawfully condemned as prize, was adjudged to be forfeited for a breach of the laws of the United States, or qualified for documentation under section 4126 of the Revised Statutes (46 App. U.S.C. 14); and

(3) otherwise qualifies under the laws of the United States to be employed in the fisheries.

(b) Subject to the laws of the United States regulating the fisheries, only a vessel for which a fishery license or an appropriately endorsed registry is issued may be employed in the fisheries.

(c) A fishery license to engage in fishing in the territorial sea and fishery conservation zone adjacent to Guam, American Samoa, and the Northern Mariana Islands may be issued to a vessel that—

(1) is less than two hundred gross tons;

(2) was not built in the United States;

(3) is eligible for documentation; and

(4) otherwise qualifies under the laws of the United States to be employed in the fisheries.

§ 12109 Recreational vessel licenses.

(a) A recreational vessel license may be issued for a vessel that is—

(1) eligible for documentation; and

(2) to be operated only for pleasure.

(b) A licensed recreational vessel may proceed between a port of the United States and a port of a foreign country without entering or clearing with the Customs Service.

(c) The Secretary may prescribe by regulation reasonable fees for issuing, renewing, or replacing a recreational vessel license, or for providing any other service related to a recreational vessel license. The fees shall be based on the costs of the service provided.

§ 12110 Limitations on operations authorized by certificates.

(a) A vessel may not be employed in a trade except a trade covered by a certificate of documentation issued for that vessel. A documented recreational vessel may be operated only for pleasure. However, a certificate of documentation may be exchanged, under regulations prescribed by the Secretary, for another type of certificate of documentation or endorsed appropriately for a trade for which the vessel qualifies.

(b) A barge qualified to be employed in the coastwise trade may be employed, without being documented, in that trade on rivers, harbors, lakes (except the Great Lakes), canals, and inland waters.

(c) When a vessel is employed in a trade not covered by the certificate of documentation issued for that vessel, or a documented recreational vessel is operated except for pleasure, the vessel and its equipment are liable to seizure by and forfeiture to the United States Government.

(d) A documented vessel may be placed under the command only of a citizen of the United States.

§ 12114 Home port.

(a) The port selected by an owner of a vessel and approved by the Secretary for the documentation of the vessel is the vessel's home port.

(b) Once a vessel's home port is established, it may not be changed without the approval of the Secretary.

(T.D. 85-143)

Cancellation of a Customs Approved Public Gauger

Notice is given pursuant to the provisions of Section 151.43, Customs Regulations (19 CFR 151.43), that the approval of Hull & Cargo Surveyors, Inc., 180 Maiden Lane, New York, New York, to gauge imported petroleum and petroleum products in the San Juan, Puerto Rico, Customs District in accordance with the provisions of Section 151.43 of the Customs Regulations is hereby canceled. T.D. 81-276 is hereby revoked.

Dated: August 23, 1985.

ROGER J. CRAIN,
Chief,
Technical Section, Technical Services Division.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 26, 1985.

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 85-40)

This ruling holds that jeans bearing the counterfeit trademarks PIERRE CARDIN, JORDACHE, SV & DESIGN and STEERHEAD DESIGN are subject to seizure by the U.S. Customs Service and, after forfeiture, disposed of pursuant to 19 U.S.C. 1526(e).

January 2, 1985
TMK-3 CO:R:E:E
726641 SO

This ruling concerns the prohibitions set forth in 19 U.S.C. 1526(e) and 15 U.S.C. 1124 against the importation and subsequent entry at any customhouse of the United States of articles manufactured abroad bearing counterfeit trademarks.

Issue: Would the entry of jeans bearing marks which are identical with or substantially indistinguishable from the registered trademarks of Pierre Cardin, Jordache Enterprises, Inc., and Englishtown Sportswear Ltd. (PIERRE CARDIN, JORDACHE, SV & DESIGN, and STEERHEAD DESIGN, respectively) amount to a "counterfeit" trademark violation.

Facts: Two shipments of jeans were entered at our Miami, Florida seaport and were seized subsequently by Customs officers as being in violation of the "counterfeit" trademark law (19 U.S.C. 1526(e)). The District Director of Customs at Miami submitted three samples from these shipments to Customs Headquarters, and asked us to confirm that the marks on the jeans are counterfeit, noting that all of the registered trademarks referred to above have been

recorded with Customs for import protection. Miami Customs also submitted copies of documents and correspondence from their file, including letters from Englishtown Sportswear, Ltd., and the attorney for Pierre Cardin stating that the manufacture of the jeans in question, bearing marks that copy their trademarks, was not authorized or licensed by either firm. We note that the jeans have labels affixed bearing the marks PIERRE CARDIN, JORDACHE and SERGIO VALENTE. The jeans labeled SERGIO VALENTE also bear a steerhead mark identical to the Englishtown Sportswear trademark "STEERHEAD DESIGN" on the waist button. The name, Sergio Valente, also appears on the button using the same stylized script for the letters "S and V" as is used in the protected trademark "SV and DESIGN." The same stylized "S and V" appear on the rivets used on these jeans to secure the ends of the pockets.

Law and Analysis: Section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e)) provides for the seizure and forfeiture of merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported in violation of the provisions of section 1124 of Title 15. A "counterfeit" is a spurious mark which is identical with or substantially indistinguishable from, a registered mark (15 U.S.C. 1127; 19 CFR 133.23a(a)).

Section 42 of the Act of July 5, 1946 (commonly referred to as the Lanham Act, 60 Stat. 440, 15 U.S.C. 1124) prohibits the entry at any customhouse of the United States of articles of imported merchandise which shall copy or simulate a U.S. registered trademark, provided a copy of such trademark registration is filed with the Secretary of the Treasury and recorded in the manner provided by regulations (19 CFR 133.1–133.7). Infringement of federally registered trademarks is governed by the test of whether defendant's use is likely to cause confusion, or to cause mistake, or to deceive.

When comparing conflicting marks to determine whether or not they are "counterfeit," we must first determine that the marks are "spurious." The term "spurious" refers to marks that are applied to goods without authorization of the trademark owner. Therefore, genuine trademarked articles could not fall within the definition of the term "counterfeit." In this case, our Miami district office contacted the trademark owners who verified that the marks were applied without authorization.

It is also important to compare the accused mark with the protected mark as it appears on the trademark owner's merchandise, and that the comparison be made from the perspective of an average purchaser rather than an expert. If, upon examination of the marks as they appear on the imported merchandise, an average purchaser would find them to be "the spitting image" of, or "substantially indistinguishable" from the trademark owners' merchandise, then a "counterfeit" trademark violation is established. See *Montres Rolex, S.A., Plaintiff-Appellee, against Dennis Snyder, Re-*

gional Commissioner, U.S. Customs Service et al., U.S. Court of Appeals for the Second Circuit, 718 F.2d 524; 220 U.S.P.Q. 10. This was an appeal from a judgement of the U.S. District Court for the Southern District of New York, Vincent L. Broderick, Judge, declaring imported gold watch bracelets to be counterfeits and therefore subject to forfeiture under 19 U.S.C. 1526(e), and directing defendant U.S. Customs Service to dispose of the merchandise.

Upon comparison of the marks which appear on the sample jeans using the test as set forth by the Court of Appeals in the *Rolex* case, we have no difficulty in concluding that the jeans in question bear "counterfeit" marks. THE PIERRE CARDIN and JORDACHE marks are identical with the registered trademarks protected by Customs. However, there is no trademark recordation with Customs for SERGIO VALENTE. Therefore, in making our comparison, we could not consider the label on the sample jeans with the mark SERGIO VALENTE to be a "counterfeit." Nevertheless, for other reasons we must conclude that the sample jeans in question are "counterfeit." In our opinion, the use of the steerhead design on the waist button, along with the stylized S and V in the first letters of the name Sergio Valente on the botton and on the rivets, makes the imported jeans "substantially indistinguishable" from the genuine trademarked merchandise in the eyes of the average purchaser.

Holding: The jeans in question, bearing the "counterfeit" marks "PIERRE CARDIN," "JORDACHE," "SV & DESIGN" and "STEERHEAD DESIGN," are subject to seizure and forfeiture. The owners of the trademark shall be notified of the seizure and the quantity of the articles seized. Unless the trademark owner, within 30 days of notification, provides written consent to the importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate disposition, the articles shall be disposed of, after obliteration of the "counterfeit" marks, where feasible (unless obliteration would destroy the articles or be disproportionately expensive with regard to their value), as follows: (19 CFR 133.23a)

(1) By delivery to federal, state or local government agencies which have a need for them, or

(2) By gift to charitable institutions which have a need for them, or

(3) By sale at public auction, after 1 year from forfeiture, after first determining that no federal, state or local government agency or charity has a need for them, or

(4) By destruction, if they are unsafe or a health hazard.

Please note that there is no preference stated in the law or regulations (19 U.S.C. 1526(e) and 19 CFR 133.52(c)) between options (1) and (2) above, and that option (3) cannot be used unless it is first established to the satisfaction of the district director that there is no government agency or charity that has a need for the articles.

482-922 O - 85 - 2

This decision is being circulated to all Customs officers for their guidance. A copy of this decision may be furnished to all interested parties.

(C.S.D. 85–41)

This ruling holds that a clamshell dredge which is at anchor and engaged in digging or suctioning material from the outer continental shelf and picking up material from a barge and dropping it overboard for use in the construction of an artificial island to be used for oil drilling is considered to be a device temporarily attached to the seabed and as such is a coastwise point within the meaning of section 4(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1333(a)).

March 28, 1985
VES–3–15/VES–10–02
CO:R:CD:C 106984 PH

This ruling concerns the applicability of the coastwise laws to dredges used on the outer continental shelf of the United States in the construction of artificial islands to be used for oil drilling.

Issues: 1. Does a dredge digging or suctioning material from the outer continental shelf of the United States ("OCS") for use in constructing an artificial island to be used for oil drilling constitute a point embraced within the coastwise laws of the United States for purposes of 46 U.S.C. 883 ("coastwise point") when—

(a) the dredge is not at anchor?
(b) the dredge is at anchor?

2. Does a dredge at anchor over the OCS constitute a coastwise point when material for use in constructing an artificial island to be used for oil drilling is dropped by a hopper barge in the vicinity of the dredge and the dredge spreads it?

3. Does a dredge at anchor over the OCS constitute a coastwise point when it picks up from a barge and drops overboard material for use in constructing an artificial island to be used for oil drilling?

Facts: The inquirer previously requested a ruling interpreting the dredging statute (46 U.S.C. 292) and concerning the applicability of that statute and the coastwise laws to the OCS. Our ruling VES–3–15 VES–10–02 CO:R:CD:C 106807 PH, August 6, 1984 (published as C.S.D. 85–11), was issued in response to the inquirer's request.

The inquirer now requests that we expand on the first paragraph of page 3 of that ruling (fourth paragraph under *Law and Analysis).* He requests a ruling on the questions in the *Issues* portion of this ruling.

Law and Analysis: Title 46, United States Code, section 883, in pertinent part, prohibits the transportation of merchandise be-

tween points in the United States embraced within the coastwise laws in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States. A point in United States territorial waters is considered a point embraced within the coastwise laws of the United States, for purposes of this provision. Customs has ruled that "merchandise," for purposes of section 883, includes anything of commercial value, including dredged or otherwise obtained material that is to be used to create an island or jetty.

Section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)) (OCSLA), provides, in pertinent part, that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of exploring for, developing, or producing resources therefrom * * * to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

Under the foregoing provision, we have ruled that the coastwise laws are extended to mobile rigs during the period they are secured to or submerged onto the seabed of the OCS (Treasury Decision 54281(1), copy enclosed). Subsequent rulings applied the same principles to drilling platforms, artificial islands, and similar structures.

Section 203 of the OCSLA Amendments of 1978 (92 Stat. 629, 635) (1978 Amendments), amended section 4(a) of the OCSLA by substituting "* * * and all installations and other devices permanently or temporarily attached to the seabed * * *" for "* * * and fixed structures * * *." The purpose of this change was stated in the legislative history to be to make it clear "* * * that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production." Thus, Federal law was intended "* * * to be applicable to activities on drilling ships, semisubmersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes." (House Report 95–590 on the 1978 Amendments, page 128, reproduced at 1978 U.S.C.C.A.N. 1450, 1534.)

On the basis of the 1978 Amendments, we ruled that the coastwise laws extend to devices such as a well casing with attendant accessory systems when submerged into the seabed of the OCS (see C.S.D. 81–95). We modified this last ruling by holding that a point at which no well has been sunk into the seabed is not a coastwise point even if there are buoys or wells in the general vicinity. We further ruled that marker buoys attached to the OCS to mark drilling sites will not be considered coastwise points within the meaning of the OCSLA (C.S.D. 84–96).

We have ruled that a location on the OCS where an artificial island is being constructed becomes a point in the United States, for purposes of the coastwise laws, when any part of the incipient artificial island is above the level of mean high water. The level of mean high water is defined as the average height of all high waters over a given location during a span of 18.6 years (C.S.D. 83–106). In C.S.D. 83–106 we also ruled that the point at which a dredge is operating around spuds attached to the seabed of the OCS is considered a coastwise point when the dredge is dredging material for use in the construction of an artificial island to be used for the purpose of oil drilling.

We have ruled that a drilling rig over the OCS is considered a coastwise point while at anchor before or after engaging in drilling at that location. Such a drilling rig would not be considered a coastwise point while at anchor at a point at which it had not engaged and was not to engage in drilling or any other activity constituting the "exploring for, developing, or producing resources" from the OCS.

The legislative history to the OCSLA Amendments of 1978 states that the purpose of the amendment of section 4(a) was to make it clear that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production (see above). On the basis of this legislative history, and on the basis of our rulings discussed above, we conclude that a dredge at anchor while digging or suctioning material from the OCS for use in contructing an artificial island to be used for oil drilling is a "device . . . temporarily attached to the seabed . . . for the purpose of exploring for, developing, or producing resources therefrom." In such a situation, the dredge is a coastwise point. Conversely, a dredge not at anchor suctioning material from the OCS is not considered a coastwise point unless it is in contact with the seabed. If, in the process of dredging, the dredge were in contact with the seabed, it would be a coastwise point.

A dredge at anchor which will spread material dropped by a hopper barge in the vicinity of the dredge is a coastwise point, under the above reasoning, assuming that the material is being spread in the process of constructing an artificial island to be used for oil drilling. Material transported from a coastwise point to the vicinity of the dredge, which is taken on the dredge in the process of spreading it, is transported in the coastwise trade. If the dredge did not take the material on board in the spreading process, the material would not be transported in the coastwise trade.

Consistent with the above, a clamshell dredge at anchor picking up material from a barge and dropping it overboard, when the material is to be used for constructing an artificial island to be used for oil drilling, is considered a coastwise point.

Holdings: 1. A dredge digging or suctioning material from the OCS for use in constructing an artificial island to be used for oil drilling—

(a) does not constitute a coastwise point when the dredge is not at anchor and is not in contact with the seabed.
(b) Does constitute a coastwise point when the dredge is at anchor or otherwise in contact with the seabed.

2. A dredge at anchor over the OCS does constitute a coastwise point when material for use in constructing an artifical island to be used for oil drilling is dropped by a hopper barge in the vicinity of the dredge and the dredge spreads it.

3. A dredge at anchor over the OCS does constitute a coastwise point when it picks up from a barge and drops overboard material for use in constructing an artificial island to be used for oil drilling.

Effect on Other Rulings: None.

(C.S.D. 85–42)

This ruling holds that if two or more products, as defined by T.D. 66–16, are blended outside the refinery where they are produced after being assigned drawback factors, the claimant for drawback may follow the convention established by T.D. 66–16 provided this does not result in more drawback than otherwise would result.

April 24, 1985
DRA–1–CO:R:CD:D
217894 GS

Issue: If two or more products, as defined by T.D. 66–16, are blended after being assigned drawback factors and outside the refinery where they are produced, may the convention established by T.D. 66–16 be applied to the products?

Facts: Company X purchases residual oil and distillate oil (both of which have drawback factors assigned by the refinery from which purchased) and blends the two to produce intermediate fuel oil (a grade of residual oil) which is then sold as bunker fuel to ships of foreign registry. Drawback is claimed under 19 U.S.C. 1309 using the drawback factor for residual oil in accordance with the convention established by T.D. 66–16.

Legal Analysis: Based on Bureau of Mines categories, T.D. 66–16, issued on January 19, 1966, established a maximum of 17 possible products which can result from drawback purposes from refining crude petroleum. This breakdown is arbitrary, since possible products of petroleum refining form a continuum, but was needed to protect the revenue.

Without T.D. 66–16, a drawback claimant could subdivide the refinery product continuum as it chooses. Thus residual oil (now a single product under the T.D. 66–16 convention) without the convention could be treated as one product or subdivided into two or

more products at the option of a claimant. A claimant exporting only a product from the high value sector of the residual oil band would subdivide the residual oil band into a high and low band. If equal amounts of product were produced from both bands; if the high had twice the value of the low; and if all the high was exported and none of the low; the claimant would receive two thirds of the duty attributable to the entire residual oil band. A claimant exporting only the low sector product, by treating the residual oil band as a single product, could receive half the duty attributable to the residual oil band. One of the purposes of T.D. 66–16 was to protect the revenue by removing a claimant's ability to increase the drawback by constantly shifting the mesh system subdividing the product continuum.

A blender (secondary manufacturer) takes its raw materials with the drawback factors attached, and no new relative value situation results as a consequence of the blending, since multiple products are not produced. Thus the need to apply the arbitrary conventions of T.D. 66–16 is absent.

In this particular case, however, the blender desires to use the convention and to claim drawback using the drawback factor for residual oil and disregarding the drawback factor for distillate. This method gives the claimant slightly less drawback but also simplifies the claim preparation. The procedure has been permitted since 1966.

It will be noted that a blender which follows the convention disregards the drawback factors pertaining to the components going into the blend and only applies the drawback factor attributable to the product resulting from the blending. In the case under consideration the product is residual oil and so this factor is used, and the higher factor for distillate oil is dropped. There is no objection to this procedure since the claimant is claiming less drawback. However if the final product were distillate oil, there would be an objection since it would be claiming more drawback than under normal procedures.

Holding: If two or more products, as defined by T.D. 66–16, are blended outside the refinery where they are produced after being assigned drawback factors, the claimant for drawback may follow the convention established by T.D. 66–16, provided this does not result in more drawback than otherwise would result. A claimant following this procedure will not be considered a manufacturer and accordingly need not file a certificate of manufacture and delivery covering the blending.

(C.S.D. 85–43)

This decision addresses how U.S. Customs officers at a port of entry, using guidelines set forth in *Stonehill Communications, Inc.* v. *John Martuge, New York Area Director of United States Customs*

Service, 512 F. Supp. 349 (S.D.N.Y. 1981), determine whether or not foreign printed books authored by United States nationals are subject to the manufacturing restrictions of the Copyright Revision Act of 1976 (17 U.S.C. 601).

May 1, 1985
CPR-1 CO:R:E:E
728026 SO

MS. JEAN GOLDMAN,
Production Manager,
The Hunger Project,
2015 Steiner Street,
San Francisco, California 94115

DEAR MS. GOLDMAN: This is in response to your letter of April 11, 1985, concerning the importation into the United States of a book, by American authors, entitled *Ending Hunger: An Idea Whose Time Has Come,* which will be printed in Italy. We understand that you have measured all of the material in the book and found that the photographs, charts, maps and graphs comprise more than 65 percent of the "live space." You submitted an uncorrected page proof and a sample copy of one of the photo signatures from the book and asked us to verify whether or not the book would be subject to the manufacturing restrictions of the Copyright Revision Act of 1976 (17 U.S.C. 601), if imported bearing the notice of copyright.

In general, the "manufacturing clause" of the Copyright Revision Act of 1976 (17 U.S.C. 601) prohibits the importation and public distribution in the United States of a work authored by a U.S. national or domiciliary consisting preponderantly of nondramatic literary material that is in the English language and protected by copyright, unless the portions consisting of such material have been manufactured in the United States or Canada. The manufacturing requirements would not extend to dramatic, musical, pictorial, or graphic works; foreign-language works; or public domain material. In cases such as this, where the work consists partially of text and partially of photos, charts, maps, and graphs, the test is whether the work, taken as a whole, consists, "Preponderantly of nondramatic literary material that is in the English language."

The legislative history of the Copyright Revision Act of 1976 indicates that the manufacturing requirements of the law would apply if the English language nondramatic literary text exceeds the pictorial or other exempt material in importance. However, as you know, the test that Customs officers use to determine if an imported work is "preponderantly" nondramatic literary material subject to the manufacturing requirement is found in *Stonehill Communications, Inc.* v. *John Martuge, New York Area Director of United States Customs Service,* 512 F. Supp. 349 (S.D.N.Y. 1981). That decision states that the test, according to the legislative history, is a mechanical one. You measure the surface area of the text and pic-

tures (or other exempt material), exclusive of margins, respectively. If there are more square inches of text than pictures, the book (or other printed matter) is "preponderantly" text and subject to the manufacturing restrictions. Otherwise, it is not.

Time constraints will not permit this office to measure the pages of sample books that are submitted to our office for a decision, so we are unable to provide you with a "ruling" on whether or not this book would be subject to the manufacturing restrictions of the Copyright Law, if imported. However, we suggest that you provide Customs officers at the port of entry with an exact measurement of the text portion of the edition published in Italy, and the photos, charts, maps, and graphs, following the guidelines set forth in the *Stonehill* decision. Assuming your measurements follow the *Stonehill* guidelines, the book would be found to be "preponderantly" pictorial and not subject to the import restrictions of the "manufacturing clause." Accordingly, you would be able to import an unlimited number of copies, bearing the notice of copyright, without restriction.

(C.S.D. 85–44)

This ruling holds that certain polypropylene/polyethylene bags and cargo slings are instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and may be released under the procedures set forth in section 10.14a, Customs Regulations.

May 7, 1985
BOR-7-07-CO:R:CD:C
107545 JM

This ruling concerns the designation of certain polypropylene/polyethylene bags and certain polypropylene/polyethylene slings as instruments of international traffic.

Issues: 1. Whether polypropylene/polyethylene bags used for the transportation of bulk wheat seed may be designated as instruments of international traffic.

2. Whether polypropylene/polyethylene cargo slings used in the transportation of sacks of wheat seed may be designated as instruments of international traffic.

Facts: The inquirer, a stevedoring company, plans to bring a quantity of polypropylene/polyethylene bags (bags) and polypropylene/polyethylene slings (slings) into the United States from South Korea.

The bags are fitted with either liftstraps of nylon/polyester webbing or polypropylene ropes to facilitate the loading and unloading of the bags when filled. The dimensions of the bags range from 35 inches by 35 inches by 43.2 inches to 35 inches by 35 inches by 76.7 inches. The capacity of the bags ranges from 2,200 pounds to 3,300 pounds.

The inquirer has advised us by telephone that the slings are made of reinforced woven polypropylene/polyethylene and we so assume for the purposes of this ruling. The slings consist of a base ranging in size from 43 inches by 51 inches to 47 inches by 55 inches with the two liftstraps on each side of the base extending beneath the base for additional reinforcement. The brochure furnished with the inquiry indicates that small sized bags may be stacked on the slings for shipment without using a pallet, that the capacity of the slings ranges from 3,300 pounds to 4,400 pounds, that the stacked dimensions of the slings range from 46 inches to 47 inches in height and that covers are available with the slings to prevent spillage and provide protection. The inquirer states that 30 sacks of wheat seed will be stacked on each sling.

The bags and slings will be brought into the United States at the port of Los Angeles/Long Beach, California. The bags and slings will be transported inland, filled with wheat seed for exportation and returned to Los Angeles/Long Beach for exportation. The inquirer states that approximately 40,000 slings and 7,000 bags will be required the first year; that the life expectancy of each sling is six voyages, that the life expectancy of each bag is six or seven voyages and that the bags and slings will be marked for purposes of identification.

Law and Analysis: To qualify as an "instrument of international traffic" within the meaning of section 322(a), Tariff Act of 1930, as amended (19 U.S.C. 1322(a)), an article must be used as a container or holder. Further, the article must be substantial, must be suitable for and capable of repeated use and must be used in significant numbers in international traffic.

The Customs Service has previously ruled (Treasury Decision 68–4) that collapsible containers of nylon, 47 inches in diameter and 70 inches high when filled and capable of holding 2,000 pounds of zinc dust or similar material, are instruments of international traffic. The bags in the subject case are substantial, capable of repeated use and will be used in significant numbers in international traffic. They will be used in a similar manner to those containers described in T.D. 68–4.

In T.D. 80–145, certain steel slings used for the transportation of steel products were designated as instruments of international traffic. In section 10.41a(a)(1), Customs Regulations (19 CFR 10.41a(a)(1)), pallets in use or to be used in the shipment of merchandise in international traffic are designated as instruments of international traffic. The slings in the subject case are substantial, capable of repeated use and will be used in significant numbers in international traffic. The base of the subject polypropylene/polyethylene slings serves a purpose similar to that of a pallet while the liftstraps serve a purpose similar to that of a sling.

Holdings: 1. The polypropylene/polyethylene bags described above are similar to the articles described in T.D. 68–4, and are in-

struments of international traffic. They may be released under the procedures set forth in section 10.41a, Customs Regulations.

2. It has been established to the satisfaction of the U.S. Customs Service that cargo slings composed of reinforced woven polypropylene/polyethylene with a base ranging in size from 43 inches by 51 inches to 47 inches by 55 inches with two liftstraps on each side of the base, and which are designed to hold small sized bags during transportation, are substantial, are suitable for and capable of repeated use, and are used in significant numbers in international traffic. Under the authority of section 10.41a(a)(1), Customs Regulations, I hereby designate the above-described cargo slings as "instruments of international traffic" within the meaning of section 322(a), Tariff Act of 1930, as amended (19 U.S.C. 1322(a)). These cargo slings may be released under the procedures set forth in section 10.41a(a)(1), Customs Regulations.

Authentication

MARVIN M. AMERNICK,
(for B. James Fritz, Director,
Regulations Control and Disclosure Law Division).

(C.S.D. 85–45)

This ruling holds that the Federal courts are the proper forum for the resolution of disputes concerning the validity of copyright registrations. The U.S. Customs Service will continue to protect a copyright while a change in copyright ownership is processed (17 U.S.C. 410(c) and 19 CFR 133.35).

May 16, 1985
CPR–3–CO:R:E:E
728121 SO

This ruling concerns (1) whether or not an importer can defend against a charge of copyright infringement by challenging the validity of a copyright registration, and (2) whether there is any lapse in Customs enforcement of a copyright registration when the registration is assigned to a new owner.

Issue: Could the importers of several shipments of fiber optic lamps detained by Customs as infringing the copyright registrations of Vincent Genovese obtain their release by offering evidence which tends to prove that (1) Mr. Genovese's copyright registrations are invalid, and (2) Mr. Genovese assigned his interest in four of the copyrights to a corporation.

Facts: Our San Francisco office detained over 13,000 fiber optic lamps, imported by several importers, which are substantially similar to one or more of the five copyright registrations for fiber optic lamps in Class VA in the name of Vincent Genovese, d/b/a Southwest Manufacturers & Distributors, Inc., which are protected by Customs. Four of the lamps consist of revolving flower arrange-

ments, and the fifth, Eleganza Di Natale (VA 115–807) is a fiber optic Christmas tree. The certificates of copyright registration indicate that the works were created and first published in 1981. The attorneys for the importers have offered evidence to attempt to establish that fiber optic lamps virtually identical to the copyright protected works were freely available on the open market in Taiwan during the years 1977 through 1980. They are alleging that the copyright registration certificates contain false material statements and, therefore, were obtained fraudulently.

Customs also received a letter dated April 25, 1985, from the attorney for Taiwan Seiko Enterprises Co. (Seiko), stating that Mr. Vincent Genovese has assigned four of his five copyright registrations to Seiko, and that Seiko is currently in the process of obtaining a certified copy of the assignment from the Copyright Office. The attorney for Seiko also asked that we continue to protect his client's copyrights until the assignments can be recorded officially, pursuant to the Customs regulation for transfer of copyright ownership, 19 CFR 133.35. The copyright for the Christmas tree lamp (VA 115–807) was retained by Mr. Genovese, and he has requested that Customs continue to provide import protection for this registration. Our San Francisco office asked if Customs could release the detained articles because (1) a court may determine that the copyright registrations in question are invalid, and/or (2) the new owner has not yet completed the process of recording the assignments from Mr. Genovese with Customs.

Law and Analysis: Section 410(c) of the Copyright Law, 17 U.S.C. 410(c) states that:

> "(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court."

The Federal courts have always been the proper forum for the resolution of disputes concerning the validity of copyright registrations. The attorneys for the importers of the detained fiber optic lamps have defended their clients against the infringement charge by challenging the validity of the copyright registrations. Customs will not entertain these arguments as a basis for a claim of noninfringement. In the case of *Original Appalachian Artworks, Inc.* v. *Toy Loft, Inc. et al.*, 215 USPQ 745 (1982), the Court of Appeals, Eleventh Circuit, decided three challenges advanced by the defendant to the validity of OAA's copyright registration for the cabbage patch kids; (1) that the OAA dolls are "copies" of pre-existing Martha Nelson dolls and thus lack the originality essential to copyright protection, (2) that OAA lost its copyright due to inadequate notice, and (3) that Xavier Roberts is guilty of fraud and unclean hands in failing to supply certain relevant information on the copy-

right registration. It appears to us that the issues raised by the attorneys for the importers in these cases are similar to issues (1) and (3) in the *Toy Loft* case.

Section 133.35 of the Customs Regulations (19 CFR 133.35) provides for a change in ownership of a recorded copyright. The application must be accompanied by a certified copy of any assignment, exclusive license, or other document recorded in the U.S. Copyright Office showing that the applicant has acquired an ownership interest in the copyright. We are of the opinion that 19 CFR 133.35 does not contemplate any break in Customs enforcement, so long as the assignee contacts Customs and asks for continued import protection until they are able to obtain a certified copy of the assignment from the Copyright Office, under applicable regulations. A fee of $80, which covers all copyrights included in the application which have been recorded previously with the Customs Service, is also required.

Holding: Customs protection for all five copyright registrations should continue in full force and effect. The imported fiber optic lamps are subject to seizure, forfeiture and destruction. However, the arguments of the attorneys for the importers concerning the validity of the copyright registrations in question may be used to establish, pursuant to 17 U.S.C. 603(c), that their clients had no reasonable grounds for believing that their act (of importing the fiber optic lamps) constituted a violation of law. We are of the opinion that Customs should permit the return of the lamps to the country of export if exportation is requested and these arguments are advanced by the attorneys for the importers to support their request. However, importation into the United States of the detained lamps is prohibited.

This decision is being circulated to all Customs officers for their guidance. Copies of this decision may be furnished to all concerned parties.

(C.S.D. 85-46)

This ruling holds that the "Hoversport," a small hovercraft used as a pleasure craft on water is classifiable under item 696.05 or 696.10, TSUS, depending on whether the craft is not valued over $15,000 or over $15,000 respectively. Unless specifically provided for, spare parts for the "Hoversport" are classifiable under item 696.15, TSUS.

May 22, 1985
VES-12-02-CO:R:CD:C
107232 PH

This ruling concerns the dutiable classification of the "Hoversport," a small hovercraft.

Issue: What are the proper dutiable classifications of the "Hoversport," a small hovercraft, and of spare parts for the "Hoversport?"

Facts: The inquirer intends to import the "Hoversport," a small hovercraft designed and built in England. Advertising literature submitted by the inquirer describes the "Hoversport" as being capable of land or water performance and designed for "your leisure and pleasure in the 80's." The "Hoversport" is shown in the advertising literature with two persons in it operating it as a boat on water. It is 11 feet, 11 inches in length and 6 feet, 3 and ½ inches in width. It is powered by a gasoline engine.

The inquirer describes a hovercraft as being a vehicle which is wholly or largely supported on a cushion of air retained beneath the hovercraft by a flexible extension to the craft structure which is known as a skirt. Amphibious hovercraft are usually propelled by multi-bladed fan or propeller units which provide a jet of air to move the craft forward.

The inquirer states that the "Hoversport" has received conflicting dutiable classifications from Customs on its importation into the United States. He requests a formal tariff classification on crafts of this kind and any spare parts shipped to the United States to support the craft.

Law and Analysis: Yachts or pleasure boats owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof are dutiable under item 696.05, Tariff Schedules of the United States (TSUS), at the rate of 1.6 percent and ad valorem, if valued not over $15,000 each, and under item 696.10, TSUS, at the rate of 2.4 percent ad valorem, if valued over $15,000 each. Parts of such yachts or pleasure boats are dutiable under item 696.15, TSUS, at the rate of 4.7 percent ad valorem unless, pursuant to General Headnote 10(ij), TSUS, they are specifically provided for in the TSUS. In that event, classification would under the specific provision. Under General Headnote 5(g), TSUS, vessels which are not "yachts or pleasure boats" within the purview of subpart D, part 6, of schedule 6 (which contains items 696.05 and 696.10) are "intangibles" which are not subject to the provisions of the TSUS.

Generally, the Customs Service has taken the position that hovercraft are to be treated as "vessels," unless used as a means of transportation in substantial operation over land (see Treasury Decisions 56390(1), 71-264(1), and 71-264(2), copies enclosed). Treasury Decision 71-264(1) holds that a hovercraft to be used as a means of commercial transportation on water or in proximity and dependent upon water as the supporting surface of the machine or its air cushion is considered a "vessel" and, pursuant to General Headnote 5(e) (now General Headnote 5(g)), TSUS, would not be subject to Customs duty.

The hovercraft under consideration appears to be generally for use as a pleasure craft on water and is advertised for "leisure and pleasure." Because it is used for pleasure and not in trade or commerce, it is not exempt from duty as an "intangible," under Gener-

al Headnote 5(g), TSUS. It is classifiable under item 696.05 or 696.10, TSUS, depending on whether it is valued not over $15,000 or over $15,000, respectively. Spare parts for the hovercraft are classifiable under item 696.15, TSUS, unless General Headnote 10(ij), TSUS, applies.

The inquirer should be aware that although a foreign-built vessel may be used in the United States for pleasure purposes and in the foreign trade generally, Federal law prohibits the use of such vessels in the coastwise trade. Coastwise trade is generally defined as the transportation of passengers or merchandise between points in the United States (see Treasury Decision 71-264(2), referred to above). The inquirer should also be aware that his letter may raise questions pertaining to boat safety and other requirements administered by the United States Coast Guard. The inquirer is informed in the letter transmitting this ruling of the mailing address to which he may send questions on this matter to the Coast Guard.

Holdings: 1. The "Hoversport," a small hovercraft generally used as a pleasure craft on water and advertised as such, is classifiable under item 696.05 or 696.10, TSUS, depending on whether it is valued not over $15,000 or over $15,000, respectively.

2. Spare parts for the "Hoversport," are classifiable under item 696.15, TSUS, unless they are specifically provided for.

Effect on Other Rulings: None; ruling letter VES-12-02-R:CD:C 102612 DR, April 1, 1977, followed.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Morgan Ford
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Gregory W. Carman
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Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

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Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

ABSTRACTED PROTEST

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	I
P85/169	Ford, J. August 9, 1985	Leather's Best Inc.	81-4-00431	Items 121.57, 121.58, 121.59 and 121.61 Various rates	It
P85/170	Ford, J. August 15, 1985	Leather's Best Inc.	80-6-00890	Items 121.57, or 121.58, or 121.59, 121.61 Various rates	It
P85/171	Ford, J. August 15, 1985	Leather's Best Inc.	81-3-00280	Items 121.57, or 121.58, or 121.59, 121.61 Various rates	It
P85/172	Rao, J. August 22, 1985	Europe Craft Imports	84-6-00794	Item 379.31 40.4% or 38.3%	It
P85/173	Rao, J. August 22, 1985	Europe Craft Imports	84-6-00796	Item 379.06P 32.7%	It
P85/174	Rao, J. August 22, 1985	Specialty Merchandise Corp.	83-9-01310	Item 737.95 14.9%	It

TEST DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ate	Item No. and rate		
	Item 121.65 Duty free pursuant to the generalized system of preferences	Leather's Best Inc. v. U.S. 708 F. 2d 715 (1983)	New York Leather; product of an eligible beneficiary country
.59,	Item 121.65 Duty free pursuant to the generalized system of preferences	Leather's Best Inc. v. U.S. 708 F. 2d 715 (1983)	New York Leather; product of an eligible beneficiary country
.59,	Item 121.65 Duty free pursuant to the generalized system of preferences	Leather's Best Inc. v. U.S. 708 F. 2d 715 (1983)	New York Leather; product of an eligible beneficiary country
%	Item 379.95 23¢ per lb. + 27.5% or 21¢ per lb. + 27.5%	Agreed statement of facts	New York Men's jackets
	Item 379.46 8%	Agreed statement of facts	New York Men's jackets
	Item A708.58 Free of duty	Agreed statement of facts	Los Angeles Plastic binoculars

ABSTRACTED REAPPRA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R85/407	Watson, J. August 9, 1985	G.T. Marsh & Co.	R66/167	Export value
R85/408	Re, C.J. August 20, 1985	Amerex Trading Corp.	76-12-02773, etc.	Export value for items marked A and B
R85/409	Re, C.J. August 20, 1985	Korvettes	73-10-02942, etc.	Export value

PPRAISEMENT DECISIONS

OF ION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Porcelain dinnerware
for ed A	Various appraised values shown on entry papers less additions included to reflect currency revaluation, items marked A Various appraised values shown on entry papers less 50% of additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. C.D. 4739	New York Not stated
	Various appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	New York Not stated

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